NO. 21367

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FELIPE RIVERA CORONADO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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TOPICAL INDEX

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

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APPELLEE'S BRIEF

I.

STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING JURISDICTION

On April 14, 1965, the federal grand jury for the Southern District of California, Southern Division, returned a two-count indictment (34638-SD) charging appellant, Felipe Rivera Coronado and Russell Raymond Reinoehl in Count One with a violation of Title 21, United States Code, Section 176 (a) (illegal importation of marihuana). In Count Two Russell Raymond Reinoehl was charged with a violation of Title 21, United States Code, Section 176(a) (concealment and transportation of illegally imported marihuana) and appellant Felipe Rivera Coronado was charged with a violation of Title 18, United States Code, Section 2 (aiding and abetting the concealment and

transportation by Russell Raymond Reinoehl of illegally imported marihuana). Clerk's Transcript, pp. 2-3.

The trial of appellant on both counts in the indictment commenced on Tuesday, June 15, 1965, and terminated on June 16, 1965. The case was tried by a jury, and the jury found the appellant guilty of both counts of the indictment. Id. at 7, 26.

On July 9, 1965, the appellant was sentenced by the Honorable Fred Kunzel to a 5-year period of incarceration on each count, to run concurrently. Id. at 35. A timely Notice of Appeal was filed by the appellant. Id. at 40-42.

The offenses occurred in the Southern District of California, and jurisdiction of the District Court was based on Title 21, United States Code, Section 176(a) and Title 18, United States Code, Sections 2, and 3231. The jurisdiction of the United States Court of Appeals for the Ninth Circuit is based on Title 28, United States Code, Section 1291 and 1294.

II.

STATUTES INVOLVED

Title 21, United States Code, Section 176(a) reads in pertinent part as follows:

> "Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced,

or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, . . . shall be imprisoned not less than five or more than twenty years, and in addition, may be fined not more than $20,000 . . . ."

Title 18, United States Code, Section 2 reads in pertinent part as follows:

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal . . . ."

III.

STATEMENT OF THE CASE

A. Questions Presented.

1. Was there sufficient evidence of possession by the appellant to sustain the convictions?

2. Was error committed by asking the appellant if he made the statement "Even if I knew anything regarding the marihuana, or if I had smoked marihuana, I wouldn't tell you"?

3. Was prejudicial error committed by the presentation of the rebuttal testimony of Customs Agent John Maxcy, assuming that the thrust of the rebuttal went to the issue of appellant's refusal to answer questions at the time of the arrest?

4. Was prejudicial error committed by allowing into evidence statements made by the appellant after he had indicated a refusal to participate further in the interview at the time of his arrest?

5. Was prejudicial error committed by the Trial Court's refusal to give either of the appellant's instructions regarding possession?

6. Was prejudicial error committed by the Trial Court's giving of instructions regarding accomplice testimony?

7. Was prejudicial error committed by the Trial Court's commenting on the evidence in the limited fashion that it did?

8. Was the appellant denied the right to an impartial jury by reason of the fact that the jurors had sat as jurors in prior similar cases?

9. Was the appellant denied the right to a speedy trial, considering the actual trial of the case occurred within three months of the offense, within three months of the arrest, within two months of the indictment, and within two months of the arraignment and plea?

B. Statement of the Facts

On March 17, 1965, at the Tecate port of entry in San Diego County, State of California, a 1959 Lincoln Continental arrived from Mexico into the United States. Reporter's Transcript, p. 7. There were two people in the car at that time, id. at 7. Russell Raymond Reinoehl was the driver, id. at 10, and appellant was a passenger. Id. at 8. Both parties identified themselves as to their citizenship, and made negative Customs declarations. Id. at 7.

Because both parties indicated that they lived in the Los Angeles area, id. at 11, Customs Inspector Joseph E. Grammer's suspicions were aroused as it seemed to him "that they were going a long ways out of their way to go home by coming through Tecate." Id. at 10. Thus, further examination was conducted, and proved negative as to the persons of both parties, but revealed marihuana in the vehicle. Id. at 8. The marihuana was found concealed in the right front fenderwell of the vehicle. Id. at 9. There were three kilo bricks, weighing about 7 pounds. Id.

Russell Raymond Reinoehl testified that on Monday, March 15,1965, he attempted to purchase some marihuana from a man in the Wilmington area, near Los Angeles. Id. at 20. Appellant was with Reinoehl at the time of this attempted purchase. Id. at 21. They then went to the Sunland-Tujunga area, near San Fernando. Id. at 20-21. It was then decided that Reinoehl and appellant would travel to Mexico to purchase some marihuana. Id. at 21-22.

Both Reinoehl and appellant traveled to Tijuana on the afternoon of the 15th of March, with Reinoehl driving his vehicle there. Id. at 22. Appellant was the party who gave Reinoehl directions relative to the streets to be traveled in order to find where the marihuana could be purchased. Id. at 23. Appellant and Reinoehl were in a "partnership type thing," where Reinoehl was supplying the money, and appellant the information on where to purchase the marihuana. Id. Appellant apparently also contributed $10 toward the total funds needed for the enterprise, including the purchase price of the marihuana and expenses of the trip. Id.

Appellant made the contact to purchase the marihuana on Monday, March 15, 1965, in Reinoehl's car. Id. at 24. The conversation between appellant and the vendor of the marihuana was in Spanish, id. at 25, and the exact nature of the conversation is unkown as Reinoehl does not speak Spanish. Id. at 24. At that time, a gun and money were given to this third person for the purchase of marihuana. Id. at 25.

Appellant and Reinoehl stayed overnight in a motel in Tijuana, id., but the marihuana was not to be delivered until the next day, Tuesday the 16th. Id. at 27. On that day, appellant was out of the presence of Reinoehl. Id. at 26. Appellant told Reinoehl that he was going to find out why the marihuana had not been delivered. Id. at 27.

On Wednesday morning, the 17th of March, 1965, appellant and Reinhoel drove to some person's house, where appellant walked in "and came out with the gunny sack, and handed it to . . ." Reinoehl. Id. at 27-28. Appellant then drove the car for a few minutes. Id. at 28. Appellant assisted Reinhoel in putting the marihuana in the fenderwell where it was found. Id.

Of the about 7 pounds of marihuana, part of it was Reinoehl's and part of it was the appellant's. Id. at 39. Reinoehl's share would have been two kilos. Id. at 40-41.

The chain of custody of the marihuana was established, id. at 44-48, and it was established that the vegetable matter was in fact marihuana. Id. at 47-48.

Appellant testified that he met Reinoehl on the afternoon of the 15th

of March, 1965, and it was suggested that they go to party in Tijuana. Id. at 50-51. Reinhoel acted suspicious, wanting to go to several places. Id. at 51-53. On Tuesday, March 16, 1965, because Reinoehl said he was not feeling well, they drove to Tecate, and were arrested. Id. at 53.

Appellant testified that he never say any marihuana in the car. Id. Appellant testified that he never saw the packages containing the marihuana previously, Id. at 55. His first knowledge that there might be marihuana in the car came when Customs Inspector Grammer indicated that he was under arrest for smuggling marihuana. Id. at 54-55.

Appellant admitted that he spoke Spanish fluently. Id. at 55. On cross-examination, appellant testified that they had spent only one night in Tijuana, id. at 55, and thus they must have traveled together to Tijuana on Tuesday, March 16, 1965.

Appellant testified that on the trip from Tijuana to Tecate, a tire "got wobbly," and both he and Reinoehl "jacked it up, and took the tire off, and changed it around." Id. at 57. Previously, Reinhoel had testified that the marihuana was put in the fenderwell by taking off the front wheel, and taking the bolts off, and putting it in. Id. at 28. Customs Inspector Grammer testified that it took about 10 to 15 minutes to remove the marihuana from the place where it was secreted. Id. at 15-16.

Appellant testified that the reason for going from Tijuana to Tecate was that Reinoehl wanted to see the town that was torn up by the Hell's Angels in 1960. Id. at 59. Appellant testified that he never drove the car belonging to Reinoehl. Id. at 60.

On redirect examination of the appellant, appellant was asked if he had a conversation with Mr. Maxcy "down there at the time of your arrest," Id. at 61. The substance of the conversation was then related. Id.

On rebuttal, Customs Agent John Maxcy testified that he conducted an interrogation of the defendant at the time of his arrest. Id. at 62. Prior to the interrogation, appellant was advised that questions were going to be asked about marihuana that had been found in a vehicle in which he was a passenger. Id. Appellant was advised that he did not have to answer any questions, that he did have the right to an attorney, and that if he did answer any questions, anything he said could be used against him in any further court proceedings. Id. at 62-63. The interrogation was very brief. Id. at 63. Appellant said that he and his companion had departed the Los Angeles area the previous afternoon, and that he did not wish to answer any further questions without first consulting an attorney. Id. at 63. He was then asked if he would tell Customs Agent John Maxcy and a state narcotics agent by the name of Frank Maldonado (who was also present, id. at 62.) anything he knew about the marihuana. At that time, appellant said that if he knew anything about the marihuana, he did not believe that he would inform them. Id. at 63.

The value of 3 kilos of marihuana was established to be approximately $60 to $75.

IV.

ARGUMENT

A. THERE WAS SUFFICIENT EVIDENCE FROM WHICH TO FIND APPELLANT GUILTY OF BOTH COUNTS OF THE INDICTMENT.

Appellant argues that there was no showing by the government that appellant possessed the marihuana involved. Appellant's Brief, p. 9. It is alleged that actual possession at the time that the marihuana entered the United States was not shown, id., and that constructive possession was not shown either by virtue of the fact that "there was no evidence of dominion or control" by appellant. Id.

The starting point here is the exhaustive treatment of the definition of the term "possession" found in Hernandez v. United States, 300 F.2d 114, 116-19 (9th Cir. 1962). The salient features of possession include these:

(1) it is immaterial whether the marihuana be within the appellant's immediate physical custody, or, indeed, that it be physically in the hands of a third person, such as Reinoehl;

(2) "possession" can be actual as well as constructive;

(3) possession can be exclusive or joint;

(4) actual or constructive possession may be established by circumstantial evidence; and

(5) convictions will be upheld where possession, actual or constructive could be honestly, fairly and conscientiously inferred. Id. at 117.

It is the contention of the appellee that appellant in this case did exercise actual possession of the marihuana. The question of possession is not merely a matter of physical custody. The physical custody of the marihuana in this case was in the hands of Reinoehl, who was driving the car in which the marihuana was secreted. "Possession" involves the power to control the marihuana. Such "possession" was in the appellant in this case. Having planned to venture to Mexico for the express purpose of purchasing marihuana, Reporter's Transcript, pp. 21-22, having supplied the information where the marihuana could be purchased, id. at 23, having contributed funds to the enterprise, id., having conducted the negotiations with the vendor in Spanish, which Reinoehl could not speak, id. at 24, 25, having actually brought the marihuana from the vendor to the car, id. at 27-28, and having assisted in concealing it in the fenderwell, id. at 28, and expecting a portion of marihuana as his own, id. at 39, 40-41 - - all of these elements clearly go to establish appellant's dominion and control over the marihuana.

For purposes of argument, if the possession was not actual personal physical dominion, it most certainly was constructive. Possession through his agent Reinoehl was shown by the same evidence. This contention is based upon joint possession by both Reinhoel and appellant, and the evidence supra permits the inference of such joint possession.

Thus, the assertion by appellant that "there was no evidence of dominion or control." Appellant's Brief, p. 9, is erroneous, as is noted in appellant's own brief where he concedes that the evidence shows that

appellant planned to participate, and did in fact participate, in the purchase of the marihuana, as well as assisting its concealment in Reinoehl's vehicle. Id.

Appellant's argument against possession is based entirely upon the assumption that possession must be by one person or another, in this case, either Reinoehl or appellant. This assumption does not permit joint possession, which was inferable in this case. Although possession cannot be imputed, it can be joint, and joint possession is the substance of the appellee's contention that the evidence was sufficient to support the conviction on the first count.

The second count specifically charges that appellant was an aider and abetter of the concealment of the marihuana. The evidence that he assisted in placing it in the fenderwell, Reporter's Transcript, p. 28, is sufficient to convict on this count of the indictment. In addition, all of the factors brought out supra also bear on the issue of aiding and abetting the concealment of the illegally imported marihuana.

B. THERE WAS NO ERROR OF PROSECUTOR MISCONDUCT ARISING FROM THE QUESTION RELATING TO A DISCUSSION BETWEEN APPELLANT AND CUSTOMS AGENT JOHN MAXCY.

On cross-examination, this question was asked of the appellant: "Do you recall making a statement to him [Customs Agent John Maxcy] that, quote 'Even if I knew anything regarding the

marihuana, or if I had smoked marihuana, I wouldn't tell you,' unquote?" Reporter's Transcript, p. 58.

Appellant argues that the question was clearly outside the scope of direct examination. Appellant's Brief, p. 10. First, it should be noted that the objection raised at the time of the trial went to the relevancy and materiality of the question. Reporter's Transcript, p. 58, and not to whether it was within the scope of the direct examination.

Appellant states that the objection was properly sustained. Appellant's Brief, p. 10. However, the record reveals that the objection was overruled. Reporter's Transcript, p. 58.

The question was clearly proper. On direct examination, appellant alleged that he had no knowledge of the presence of the marihuana in the car. Id. at 53. This statement, made at the time of his arrest, was one from which a jury might infer that he did in fact have knowledge. It bore on the knowledge of the appellant, a matter which had been brought out on direct examination.

Appellant contends that the purpose of the question was to infer guilt of the appellant by his silence. Appellant's Brief, p. 10. Appellant then cites Griffin v. California, 380 U. S. 609 (1965) in support of the proposition that comment on silence is forbidden. First, Griffin involved commenting on the failure of the defendant to testify at the time of trial. Here, the appellant did testify at the time of the trial. Reporter's Transcript, 49-61. Appellant cites no authority for the proposition that failure to

communicate at the time of the commission of the offense is improper.

Even if the evidence were improper, it is submitted that the error is harmless. The Trial Court instructed the jury as follows:

> "After taking a defendant into custody, arresting officers sometimes make accusatory statements to him, or in his presence, with a view to prompting some admission of guilt. An accusatory statement, as the term suggests, is a statement which in substance or effect accuses a person of guilt. The law does not require a defendant in custody to make any reply to any accusatory statement made to him, or in his presence, either orally or in writing, so neither the accusatory statement nor any failure to make reply thereto is evidence of any kind against the accused; that is to say, neither the accusatory statement nor any failure to reply thereto can create any presumption or permit any inference of guilt, and a defendant who is in custody has a perfect right not to make any statement at all." Id. at 88-89.

The instruction clearly vitiated any prejudicial effect that the question may have had earlier.

Moreover, whatever error existed in asking the question in cross-examination disappeared when the appellant testified on redirect examination about the conversation with Customs Agent John Maxcy after his arrest. Id. at 60-61. If evidence is disclosed by other testimony without

objection (as it was by appellant's redirect examination), any alleged error is harmless. Sorrentino v. United States, 163 F. 2d 627 (9th Cir. 1947).

Finally, the alleged error occurred in the cross-examination of the appellant. It is well-recognized that the limits of cross-examination are within the broad and sound discretion of the Trial Court. Glasser v. United States, 315 U. S. 60 (1941). This discretion will only be reversed for manifest error or abuse of discretion, United States v. Migliorino, 283 F.2d 7 (3d Cir. 1956), where it is prejudicial, and not where it is harmless. Sorrentino v. United States, supra.

C. THERE WAS NO ERROR IN PRESENTING REBUTTAL TESTIMONY BY CUSTOMS AGENT JOHN MAXCY.

Appellant bases the alleged error on the reasoning set forth in Griffin. Once again, it must be pointed out that Griffin applies only to the failure of appellant to testify at the time of trial, and comment thereon. In this case, as noted supra, appellant did testify at the time of trial. Moreover, the Trial Court's instructions relative to his right to remain silent at the time of his arrest cured any error arising from the questioning of the appellant or in presenting the rebuttal testimony of Customs Agent John Maxcy.

However, it is quite evident that the rebuttal testimony of Customs Agent John Maxcy was quite proper. Appellant had gone into the nature of

any conversation between appellant and Customs Agent John Maxcy at the time of the arrest. Appellant went into this matter on redirect examination of appellant. Reporter's Transcript, pp. 60-61. Maxcy's version of the conversation was quite proper. Moreover, it had the effect of impeaching appellant by presenting contradictory testimony as to what was said by appellant at the time of the arrest. Finally, there was no objection raised to the rebuttal testimony of Customs Agent John Maxcy. Specification of error "shall quote the grounds urged at trial for the objection . . . ." Rule 18(2)(d) of The United States Court of Appeals for the Ninth Circuit. Appellant has not and cannot comply with this rule, due to his failure to urge an objection at the trial.

D. THERE WAS NO ERROR IN INTRODUCING STATEMENTS MADE BY APPELLANT AFTER APPELLANT HAD DECLINED TO CONTINUE IN THE INTERVIEW.

Once again, appellant brings for review a matter to which no objection whatsoever was raised at the time of trial. The alleged error is not the contravention of constitutional rights, and could not be as Miranda v. Arizona, 384 U. S. 436 (1966) is not retroactive to apply to this case, Johnson v. New Jersey, 384 U. S. 719 (1966). The objection takes the form of alleged prosecutor misconduct. The failure to promptly object and request the judge to charge the jury to disregard the argument or otherwise remedy the alleged misconduct precludes consideration of the matter on

appeal. Rule 18(2)(d) of The United States Court of Appeals for the Ninth Circuit.

Appellant alleges that the final question relative to whether or not appellant wanted to talk about the marihuana (coming immediately after appellant's expressed desire to terminate the interview) "amounts to a psychological coercion that has never been proper." Appellant's Brief, p.12. For this proposition, there is no authority cited. The failure to cite authority probably reflects a total absence of any for such a factual situation as presented in this brief. First, appellant was remarkably well-advised of his constitutional rights, considering that this interview pre-dated Miranda by one year, Reporter's Transcript, pp. 62-63, and that it was so brief, id. at 63. There is no indication of prolonged interviewing, or physical contact at all. The statement was not secured by "clearly improper means." Appellant's Brief, p. 12. Its introduction into evidence was not misconduct.

Finally, the statement testified to did materially add to the government's case, as it indicated a discrepancy between appellant's testimony and that of Customs Agent John Maxcy. It was impeachment, and permissible. It was not purposeful prejudicial solicitation of improper evidence.

E. THERE WAS NO ERROR IN THE TRIAL COURT'S REFUSAL TO GIVE EITHER OF APPELLANT'S INSTRUCTIONS REGARDING POSSESSION.

Refusal to give a requested instruction may be regarded as

reversible error only if (1) it is in itself a correct charge, (2) it is not substantially covered in the main charge, and (3) it is on such a vital point in the case that failure to give it deprives the appellant of a defense or seriously impairs its effective presentation. Pine v. United States, 135 F.2d 353 (5th Cir.) 1943 , cert. denied, 320 U.S. 740 (1943).

Both of appellant's instructions fall on the third requirement, that of being vital to the defense of the case. The first instruction requires that "the undisputed direct proof" place the possession in some other person. Clerk's Transcript, p. 28. The simple fact is that there was no such "undisputed direct proof" of possession by some other person. The evidence whether the possession was exclusive in Reinoehl or joint between appellant and Reinoehl was in considerable dispute. See the argument under A, supra .

The second instruction starts with the proposition "if the defendant had neither physical custody nor control over alleged illegally imported narcotic drug." Id. at 29. The aforementioned evidence, supra argument under A, all goes to establish that appellant did exercise the requisite control.

With regard to the second requested instruction by appellant, the words of the Trial Court are pertinent here:

> "I don't think this instruction on 'possession' is required here. The question is who the jury believes as to whether or not this defendant was in this venture as being a joint

venture." Reporter's Transcript, p. 78.

The point is: if the appellant was in fact a joint venturer in this enterprise, he had possession. Thus, any instruction relative to possession was unnecessary. Therefore, it could hardly be said to be vital to the defense.

F. THERE WAS NO ERROR IN THE TRIAL COURT'S REFUSAL TO GIVE ADDITIONAL INSTRUCTIONS AS TO ACCOMPLICE TESTIMONY.

First, appellant did not request additional instructions relative to the testimony of the accomplice. Second, appellant did not object to the accomplice instruction given. Appellant has thus failed to preserve the record with regard to this point raised on appeal. Rule 18(2)(d) of The United States Court of Appeals for the Ninth Circuit. Moreover, Rule 30, Federal Rules of Criminal Procedure, provides in part:

> "No party may assign as error any portion of the charge or ommission therefrom unless he objects thereto before the jury retires to consider its verdict, stately distinctly the matter to which he objects and the grounds of his objection. . . ."

It may be submitted that timely objection was raised. Appellant's Brief, p. 14. However, the objection was in the nature of a request for clarification. Reporter's Transcript, p. 98. Appellant's counsel felt that the Trial Court instructed the jury that they must believe that appellant told the truth beyond all reasonable doubt. Id. The Trial Court then

proceeded to clarify the matter by stating that to convict the testimony of the accomplice had to be believed beyond all reasonable doubt, and that his testimony should be viewed with great caution and care. Id. at 99.

Assuming that there was a timely objection, it was not plain error to give the instruction as rendered. As noted in Appellant's Brief, p. 13, the Trial Court twice advised the jury to view the testimony of the accomplice with great care and caution. Id. at 90, 95.

Appellant argues that the instruction was diminished by the Trial Court's comment that the sole question involved believing either the accomplice beyond all reasonable doubt, or the appellant. Appellant's Brief, p. 13. The comment allegedly vitiated the effect of instructing the jury to consider the accomplice testimony with great caution and care. Id. at 14.

It is submitted that the comment did not have that effect. The comment merely said that, viewing the accomplice testimony in the manner instructed, the question in the trial resolved itself to the credibility of the accomplice and appellant. It cannot logically be argued that the Trial Court removed the thrust of the accomplice instruction by his comment on the evidence in the limited manner which he did.

G. THERE WAS NO ERROR BY THE TRIAL COURT BASED UPON THE LIMITED COMMENT BY THE TRIAL COURT ON THE EVIDENCE.

The allegedly defective comment related to whether the jury

believed the testimony of Reinoehl or that of appellant. Appellant's Brief, p. 15. Appellant then argues that if the comment was proper, it destroyed the instruction on accomplice testimony. Id.

First, the latter portion of this argument had been discussed under F, supra. The remaining issue is whether the comment by the Trial Court was in itself defective and improper. For this proposition, appellant cites no authority.

Second, there was no objection at the time of trial to any comments made by the Trial Court. Rule 51, Federal Rules of Criminal Procedure, requires objection to be made at that time in order to save it for appellate review, unless it amounts to plain error under Rule 52(b). It can hardly be said that this comment was plain error. The Trial Court had indicated to the jury that they were entitled to disregard his comments, Reporter's Transcript, p. 99, when he made the comment, and this fact is noted in Appellant's Brief, p. 14. Moreover, the jurors were instructed that they were the sole judges of the facts in the case, Reporter's Transcript, p. 83, 89, 95, that they were the sole judges of the credibility of the witnesses and the weight that their testimony deserves, id. at 89, 95, and that they were at liberty to disregard any comment made on the evidence, id. at 96.

In the face of these instructions, it is submitted that it is difficult to see how any error, if error there was, was harmful.

Finally, it s nould be noted that no accomplice cautionary instructions are required by law. "The cautionary instruction, although desirable,

is not 'an absolute necessity.'" Audett v. United States, 265 F.2d 837, 847 (9th Cir. 1959).

H. THERE WAS NO DENIAL OF APPELLANT'S RIGHT TO AN IMPARTIAL JURY BASED UPON THE JURORS' PREVIOUS EXPERIENCE AS JURORS.

There is no authority cited for this propostion, either as a matter of constitutional law, or statutory law. Nor is there much authority lent to the conclusion by logic. It simply does not follow that continual exposure by a juror to particular types of offenses "creates an atmosphere of prejudice unfavorable to a defendant." Appellant's Brief, p. 16. The basis for this contention is not stated. In fact, it might be argued that such continual exposure works for the benefit of the defendant.

The proper manner in which to raise this issue was by way of a challenge to the panel or array. Although such a challenge might be made at various times, including perhaps even as late as the time of trial, it cannot be first made on appeal. Higgins v. United States, 160 F. 2d 222 (D.C. Cir 1946), cert. denied, 331 U. S. 822 (1947). Moreover, such a challenge must go to the merits and involve prejudice, and must be shown by the defendant. Brookman v. United States, 8 F. 2d 803 (8th Cir. 1925). Appellant has failed to make the requisite showing in this case.

I. THERE WAS NO DENIAL OF APPELLANT'S RIGHT TO SPEEDY TRIAL, WHERE TRIAL TOOK PLACE WITHIN THREE MONTHS OF THE OFFENSE, WITHIN THREE MONTHS OF THE ARREST, WITHIN TWO MONTHS OF THE INDICTMENT, AND WITHIN TWO MONTHS OF THE ARRAIGNMENT AND PLEA.

There is again no authority cited to support the proposition that a trial within the time periods involved violates the sixth amendment. In fact, there is authority directly contrary. In Mack v. United States, 326 F. 2d 481 (8th Cir.), cert. denied, 377 U. S. 947 (1964), the court held that trial within 6-1/2 months of the commission of the offense, within three months of the arrest, and within three months of the issuance of the indictment was a speedy trial. "First, from a standpoint of time, it is obvious that appellant received a speedy trial." Id. at 486. Mack involved a violation of the narcotic laws, namely the illegal importation of heroin, which is quite similar to the charge here, the illegal importation of marihuana.

In this case, as in Mack, the right to a speedy trial was not asserted by appellant. There the court said "it is settle law that in order to establish the right to a speedy trial under the Sixth Amendment this right must be asserted in some manner by the defendant or it is deemed waived." Id.

Appellant complains that the right to speedy trial is violated by the fact that the appeal is still pending some two years after the trial.

However, it should be noted that "the provisions of the Sixth Amendment guaranteeing a speedy trial contemplate the undue delay in the prosecution of a pending charge . . . ." Id. It does not contemplate the appeal, but only the trial of the offense charged. There is no authority linking the time that the appeal takes to the right to a speedy trial of the offense charged.

Finally, although the Clerk's Transcript is silent on the issue, appellant's brief was not received in appellee's office until March 2, 1967.

V.

CONCLUSION

The government respectfully submits that the appellant's conviction should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Joseph A. Milchen

JOSEPH A. MILCHEN